No. 13713

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GOLDEN GRAIN MACARONI COMPANY, INC., a Corporation, and PASKEY DEDOMENICO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE

HONORABLE EDWARD P. MURPHY, *Judge*

BRIEF FOR APPELLANTS

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I. STATEMENT OF THE CASE

Appellant Golden Grain Macaroni Company is a corporation organized under the laws of the state of California, which was and now is engaged in the manufacture and sale of macaroni products. The

plant here in question is located at Seattle, Washington. Appellant Paskey Dedomenico is president of the corporation and general manager of the Seattle, Washington plant.

On July 16, 1951 appellants shipped forty-nine cases of cut macaroni for delivery to Missoula, Montana, consigned to County Fair Market (Tr. 25) under bill of lading (Plaintiff's Ex. 2). This macaroni was manufactured and packed during the twenty-fifth week of the year 1951 (Tr. 179-180) or the week of June 17 to 23, 1951. Samples for analysis were taken from this shipment by Food and Drug Inspector Ford (Tr. 41) and by him given a number 30-340 L.

Also on July 16, 1951 appellants shipped macaroni products consisting of eight cases of bulk elbow macaroni and two cases of bulk spaghetti for delivery to Eugene, Oregon, both consigned to General Grocery (Tr. 76-77) under the same bill of lading (Plaintiff's Ex. 3). These macaroni products were manufactured and packed during the twenty-eighth week of the year 1951 or the week of July 8 to 14, 1951 (Tr. 179-180). Two samples from this one shipment were taken for analysis by Food and Drug Inspector Shallit and given numbers 29-871 L and 29-872 L (Tr. 77).

On July 26, 1951 appellants shipped macaroni products consisting of twenty cases of elbow macaroni and twenty-five cases of spaghetti for delivery to Anchorage, Alaska, consigned to J. B. Gottstein Company (Tr. 46) under the same bill of lading (Plaintiff's Ex. 4). This macaroni was manufactured and packed during the thirtieth week of the year 1951, or the week of July 22 to 28 (Tr. 179-180). Two samples for analysis were taken from this one shipment by Food and Drug Inspector Chambers (Tr. 48) and by him given numbers 29-477 L and 29-478 L.

All the samples referred to above were analyzed by Food and Drug Chemist Elliott (Tr. 153, etc.) and portions furnished the appellants were analyzed by appellants' witness, a chemist Spinelli (Tr. 229, etc).

On July 18 and 19, 1951 Food and Drug Inspectors Shallit and Allen made an inspection of the Golden Grain Macaroni plant (Tr. 78). After identifying themselves as inspectors they first inquired if appellant Dedomenico was in and were informed that he was in California. The inspectors then made oral request of the office girl for permission to make an inspection. She referred the request to Mr. Joseph Mulvaney, who was in charge of production. Mr. Mulvaney, through the office girl, stated that he had no authority to grant permission for an inspection

(Tr. 80). Permission subsequently was granted by Mr. Jack McDiarmid. Mr. McDiarmid was the sales manager and had no duties with relation to the business other than sales and was not in charge of the building or production (Tr. 183 and 285). He had no authority to grant such permission nor did any other employee (Tr. 293).

On July 31, 1951 the same inspectors returned to the plant. Appellant Dedomenico was then present and granted permission to make an inspection (Tr. 112). The inspection on this occasion was not detailed. The conditions of the plant were improved though an unspecified amount of moth activity was present.

With particular reference to appellant Dedomenico, on June 28, 1951 he left Seattle for San Francisco and returned on July 25, 1951 (Tr. 284). Prior to his departure and on June 25th the plant was thoroughly and completely cleaned. During the course of his management appellant Dedomenico had instituted and set up sanitation procedures and in addition for a period of several years had employed the United States Insecticide Company for the purposes of making inspections and maintaining the plant in a sanitary condition (Tr. 288).

After administrative notice and hearing (Tr. 55)

appellants were tried by the court pursuant to the indictment (Tr. 3) and judgments and sentence entered December 8, 1952. Appellants' motion for new trial was denied on February 25, 1953, whereupon this appeal was taken.

II. QUESTIONS PRESENTED

1. Who was the owner, operator or custodian at the time of the plant inspection of July 18 and 19, 1951?

2. Did the Pure Food and Drug inspectors first make request and obtain permission of the owner, operator or custodian?

3. If not, then is evidence obtained from that inspection admissible?

4. Is Section 402(4) Federal Food, Drug and Cosmetic Act unconstitutional because of indefiniteness and therefore contrary to the Sixth Amendment to the United States Constitution?

5. Was admissible evidence offered by the United States to show adulteration under 402(4) Federal Food, Drug and Cosmetic Act sufficient to sustain convictions:

   (a) Was evidence, if any, of the state of insanitation obtained on the July 31, 1951 inspection of such a continuing nature

that shipments of products prepared during the week of July 8 to 14 could be affected?

(b) Was evidence, if any, of the state of insanitation obtained on the July 31, 1951 inspection sufficient to show that products shipped on July 26, 1951 could be affected?

6. Do Counts III and IV of the indictment charge but one offense?

7. Do Counts V and VI of the indictment charge but one offense?

8. Did the shipment of the products complained of consist in whole or in part of a filthy substance within the meaning of Section 402(a) 3 of the Federal Food, Drug and Cosmetic Act?

(a) What is the meaning of the expression "filthy substance" as used in the statute?

(b) Was the evidence of filth, if any, sufficient to sustain the convictions?

9. Was the evidence sufficient to convict the appellant Paskey Dedomenico as an individual?

10. Is an individual officer of a corporation liable in a criminal prosecution for the criminal acts of another in which such person does not participate, aid or abet, and has expressly issued instructions against such acts?

III. SUMMARY OF ARGUMENT

The Government proof of interstate shipments of adulterated food proceeded along two lines.

1. That the food had been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, and;

2. That the products consisted in whole or in part of a filthy substance.

It is the appellants' contention that evidence obtained on the first inspection with reference to the sanitary conditions of the plant was obtained illegally and therefore not admissible and that the evidence obtained on the other inspection was not sufficient to sustain the convictions. Appellants further contend that Section 402(a) 3 of the Act is void under the Sixth Amendment for vagueness and indefiniteness.

As to the shipments themselves, Counts III and IV charge but one offense and Counts V and VI charge but one offense. Therefore appellants twice were put in jeopardy and the Trial Court had no jurisdiction to enter convictions and sentences on Count IV and Count VI. The products did not consist of a filthy substance when the expression is defined and used in its ordinary sense and under the meaning which Congress intended. Finally it is con-

tended that Paskey Dedomenico as president, is free from any personal guilt since he was not present at the plant during the time the articles complained of were prepared and shipped, did not participate in any crime alleged and in fact as an individual, did his utmost to comply with the statute.

IV. ARGUMENT

A. EVIDENCE OFFERED BY THE UNITED STATES AND ADMITTED BY THE COURT OVER APPELLANTS' OBJECTION TO SHOW THE ADULTERATION OF FOOD IN THAT IT HAD BEEN PREPARED, PACKED AND HELD UNDER INSANITARY CONDITIONS WHEREBY IT MAY HAVE BECOME CONTAMINATED WAS OBTAINED ILLEGALLY.

(1) Officers designated by the Pure Food and Drug Administrator did not first make a request and obtain permission of the owner, operator or custodian as required by statute. Section 704 Federal Food, Drug and Cosmetic Act of 1938 as amended (21 USCA 374) entitled "Factory Inspection" provides in pertinent part "For purposes of enforcement of this act officers or employees duly designated by the secretary, *after first making request and obtaining permission of the owner, operator or custodian*

thereof, are authorized (1) to enter at reasonable times any factory, warehouse or establishment in which food, drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into interstate commerce * * * (2) to inspect at reasonable times such factory, warehouse, establishment or vehicle and all pertinent equipment, finished and unfinished materials, containers and labeling therein." (Emphasis supplied)

The law and decisions are clear that unless permission for the inspection is requested and obtained from the owner, operator or custodian of the plant any evidence obtained is illegal and not admissible. In the case of *U. S. v. Maryland Baking Co., et al*, 81 Fed. Supp. 560 (D.C. N.D. Ga. 1948), the court held that where the agents did not originally request nor obtain the manager's permission to inspect the plant the inspection was illegal and evidence obtained thereby was inadmissible regardless of the consent to inspection given by the plant superintendent who was the subordinate manager. In that case, though the co-owner was present on the premises, the agents obtained the permission from the plant superintendent. The facts established that the plant superintendent did not really consent to the search but merely assumed that the officers had the right to inspect and therefore did

not offer any objections. The court stated:

> "The defendants are entitled to insist on compliance with the statute."

In the case of *U. S. v. Cardiff.* 194 Fed. (2d) 686, 9th Cir. (1952, affirmed 344 U.S. 174, 97 L.Ed. 132, the Honorable Judge Denman made it clear that the requirement of first making request and obtaining permission must be given effect and could not be made nugatory by imposing a penalty for refusal to grant such permission.

Appellants' factory was inspected on July 18 and 19 after permission was refused by Mr. Joseph Mulvaney, who was in charge of production (Tr. 80). They did have the permission of Mr. Jack McDiarmid, who was the *sales manager* and had no duties with relation to the business other than sales and was not in charge of the building or production (Tr. 183 and 285). He had no authority to grant such permission nor did any other employee (Tr. 293) but, as in the case of *U. S. v. Maryland Baking Co., supra,* permission was granted because Mr. McDiarmid thought they had the right to make inspection and therefore did not object (Tr. 190). It is significant that the inspectors knew at the time that appellant Dedomenico was absent from the city of Seattle (Tr. 190). It necessarily follows from the foregoing rules of law and the facts of this case that unless the sales man-

ager was the custodian of the plant the evidence obtained was illegal and it was error to admit the same on the trial.

(2) THE COURT ERRED IN RULING THAT THE SALES MANAGER WAS THE CUSTODIAN OF APPELLANTS' FACTORY.

Implicit in the court's reasoning in the case of *U. S. v. Maryland Baking Co.*, supra, was the fact that criminal prosecution might well depend on whether permission to make an inspection was granted or refused, and that no mere employee should be able to waive the right of a business corporation or its officers to the immunity from giving evidence against themselves. Unquestionably the sales manager who gave the permission in this case was not the owner, neither was he the operator of the plant. The question remains, was he the custodian, as held by the trial court. Defined in its simplest terms, a custodian is one who has the care and possession of a thing. Bouvier's Law Dictionary, Rawle's 3rd Ed. Vol. I, page 741. Or when applied to a factory or plant the custodian would simply be the one in charge of the plant or factory. The testimony on the trial clearly established that Mr. McDiarmid, who gave the permission, was not the custodian but only was the sales manager. Quoting from McDiarmid's direct examination (Tr. 183):

Q. In what capacity were you employed in May and June and July of 1951?

A. As sales manager.

Q. And as sales manager what are your duties and responsibilities, sir?

A. I have charge of all sales and anything pertaining to sales.

Q. Do you have any duties with relation to the operation of the business other than the sales?

A. No, I haven't.

Q. Do you have any of your duties with relationship to the production of any of the food products that are produced out there?

A. No, I have not.

Q. In the absence of Mr. Dedomenico are you in charge of the building or production?

A. No, I am not.

Q. Who is?

A. Mr. Mulvaney has charge of the production.

Q. Is that same — was that true in June and July of 1951?

A. Yes, it was.

Q. Did you have any authority, were you authorized by Mr. Dedomenico, sir, to permit anyone to go into the plant?

A. No, I was not authorized by him.

Q. And at that time who was the custodian of the plant, sir?

A. Well, Mr. Mulvaney has always had charge of the production.

Q. Well, was he in charge of the building and and the warehouse and plant?

A. Yes, he had been in charge of the plant and the warehouse.

Quoting from the testimony of appellant Dedomenico (Tr. 284, 285):

Q. In your absence, Mr. Dedomenico, who was in charge of the plant? Who is the custodian?

A. Joe Mulvaney is the custodian of the plant.

Q. In Mr. Mulvaney's absence who is in charge of it?

A. If Mr. Mulvaney is not here he has another there who takes charge of the plant.

Q. And what is his name?

A. Al Whitehead.

Q. And who was in charge of the plant when you left in — during the period of time you were gone in June and July of 1951?

A. I left for San Francisco June 28. Joe Mulvaney was in charge of the plant.

Q. In what capacity is Mr. McDiarmid employed?

A. Mr. McDiarmid is the sales manager.

Q. Does he have any responsibility or duty with relationship to the plant and the manufacturing and production?

A. No sir, I have never given Jack McDiarmid any responsibility in regard to the plant whatsoever.

The foregoing testimony conclusively establishes that in no sense could Mr. McDiarmid, who gave the

permission to make the inspection, be termed the custodian. On the contrary his activities were confined to sales, a field normally outside the plant or factory. Nor could he, any more than a total stranger, assume unto himself the duties or the authority of a custodian within the meaning of the Act and open the doors to evidence which might be incriminating when used against the corporation or its offcers. It follows that evidence obtained by Inspectors Shallit and Allen on July 18 and 19, 1951 was therefore obtained illegally and not admissible to prove adulteration within the meaning of Sec. 402(a) 4 of the Federal Food, Drug and Cosmetic Act. (Title 21, USCA, Sec. 342 (a) 4).

B. SECTION 402(A) 4, FEDERAL FOOD, DRUG AND COSMETIC ACT (21 USCA 342 (a) (4) IS UNCONSTITUTIONAL IN THAT IT IS SO INDEFINITE, UNCERTAIN AND OBSCURE THAT IT DOES NOT INFORM ONE ACCUSED THEREUNDER OF THE NATURE AND CAUSE OF THE ACCUSATION IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

> "Section 402: A food shall be deemed to be adulterated—(a)4 if it has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered injurious to health;"

Appellants in making this contention fully recognize the rule followed in this and other jurisdictions that it is incumbent upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the Constitution and that it is not sufficient to raise a doubt. *Gorin v. U. S.*, 111 Fed. (2d) 712, 9th Cir. (1940), citing the Legal Tender Cases, 79 U. S. 457, 20 L.Ed. 287. The constitutionality of Sec. 402 (a) 4 of the Act has not heretofore been raised in this jurisdiction. It was decided, however, by the United States Court of Appeals for the 8th Circuit in the case of *Berger v. U. S.*, 200 Fed. (2d) 818 (1952) that the section in question conveys a sufficiently definite warning as to what

conduct would constitute a crime and is not unconstitutional for vagueness and uncertainty. Appellant urges that the foregoing decision of the Eighth Circuit is contrary to established principles of constitutional law, is logically unsound and should not be followed in this jurisdiction. The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation;"

If the section of the Act is so uncertain and indefinite as to be contrary to the Sixth Amendment then it also runs contrary to the Fifth Amendment to the Constitution of the United States in that there has been an illegal delegation of legislative power to the courts and juries which runs contrary to the due process clause: "Nor be deprived of life, liberty or property without due process of law."

In an extremely well reasoned opinion the United States Supreme Court in the case of *Connally v. General Const. Co.*, 269 U.S. 385, 70 L.Ed. 322, found unconstitutional indefiniteness in a statute calling for "the current rate of per diem wages in the locality" where contractors were doing Government work. The test laid down was whether or not the Legislature uses terms "so vague that men of common intelligence must

necessarily guess as to its meaning and differ as to its implication. The terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." It is a well recognized requirement consonant alike with ordinary rules of fair play and the settled rules of law. The opinion contains an extensive analysis of the cases and the court at the outset balances the points of differentiation.

> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld. In others declared invalid. The precise point of differentiation in some instances is not easy of statement but it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning well enough known to enable those within their reach to correctly apply them. *High Grade Provision Co. v. Sherman*, 266 U. S. 497, 502; or a well settled common law meaning, notwithstanding an element of degree in the definiteness as to which estimates might differ. *Nash v. U. S.* 229 U. S. 373, 376, 57 L.Ed. 1232. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223. Or, as broadly stated by Mr. Chief Justice White in *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 92:
>
> 'That for reasons found to result either from the text of the statutes involved or the subjects with

> which they dealt a standard of some sort was afforded'."

In *U. S. v. Brewer*, 139 U.S. 278, 35 L.Ed. 190, an early landmark case, the court stated at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute."

In *Musser v. Utah*, 333 U.S. 95, 92 L.Ed. 562, in 1947 the United States Supreme Court remanded and vacated a conviction under a Utah statute which made criminal a conspiracy

> "To commit acts injurious to public morals."

The charge was advising the practice of polygamous marriages. The court stated:

> "Standing by itself it would seem to be warrant for conviction the agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notion of what was good for health and morals."

In the case perhaps most frequently cited, *U. S. v. L. Cohen Grocery Co.* 255 U. S. 89, 65 L.Ed. 516, the court used this language in declaring the Lever Act unconstitutional:

> "The sole remaining inquiry therefore is the certainty or uncertainty of the text in question, that is whether the words 'that it is hereby made unlawful for any person willfully to make any un-

> just or unreasonable rate or charge in handling or dealing in or with any necessaries', constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusations against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially in hearing in the transaction as to which it provides. It leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the court below in its opinion to the effect that to attempt to enforce this action would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to public interest when unjust and unreasonable in the estimation of the court and jury."

A case frequently cited in contending for the constitutionality of an act which it is alleged is indefinite is *Nash v. U. S.* 229 U.S. 373, 57 L. Ed. 1232, in which Justice Holmes, in his philosophical and common law approach stated that the fact that the definition contained an element of degree as to which estimates may differ does not make it void for vagueness. However, in the case of *International Harvester v. Kentucky*, 234 U. S. 216 (1914), 58 L. Ed. 1284, in which Justice Holmes declared a state of Kentucky anti-trust law

void for vagueness, he said of his own opinion in *Nash v. U. S.*, supra:

> "It goes no farther than to recognize that as with negligence between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and the complexity of life makes it impossible to draw a line in advance without an artificial simplification . . . The conditions are as permanent as anything human and a great body of precedence on the civil side coupled with familiar practice make it comparatively simple for common sense to keep to what is safe."

A recent case to illustrate when the court held a statute not void because of vagueness or uncertainty, is the case of *U. S. v. Petrillo*, 332 U. S. 1 (1947), 91 L. Ed. 1877. The statute prohibited the act of coercing a licensee to employ in the broadcasting business any person or persons in excess of the number of employees needed by such licensee to perform actual services. In reaching its conclusion the court reasoned, and properly so, that any person knows when he is willfully attempting to compel another to hire unneeded employees.

The case of *U. S. v. Durst*, 59 Fed Supp. 891 (D.C. S.D. W.Va.) (1945) is particularly appropriate in this discussion for it concerns the question of sanitation. The case was decided on the demurrer to an information charging violation of a War Food distribution order issued under Second War Powers Act of 1942, 56

Stat. 171. The court held that any statute or regulation purporting to define crime and fix penalty therefor which fixes no definite standard by which guilt or innocence may be measured violates the U. S. Constitution, Amendment Six, and that a War Food Distribution Order (having the effect of a statute) requiring slaughterers to maintain "minimum sanitary facilities" defined as a structure that is "reasonably" fly and rodent-proof with "ample" light and ventilation and a "reasonable" distance from specified sources of fly-breeding or contamination was invalid because of the uncertainty of the quoted words. The court reasoned that what would be reasonable or unreasonable is necessarily left for determination according to the fastidiousness or sense of cleanliness of the individual whether juror or judge who is to pass upon the question. This is not the fixed and unimmutable standard of guilt which is required of a criminal statute or regulation.

In the light of these principles and decisions we now comes to the consideration of legislation on this review which makes it a criminal offense for any person to introduce or deliver for introduction into interstate commerce any food which "* * * has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth * * *" Appellants urge that this provision presents

a double uncertainty fatal to its validity as a criminal statute. First, what are "insanitary conditions"; second, under what circumstances do conditions become so insanitary that food prepared, packed or held under them "may become contaminated with filth?" To use the language of the case of *U. S. v. Capital Traction Co.*, 34 App. Dec. 592, holding a statute unconstitutional for vagueness which made it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding." "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. Penal statutes prohibiting the doing of a certain thing and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirement and the courts upon another."

Is not the determination of what is or what are insanitary conditions, to use the words of the court in the case of *U. S. v. Durst*, supra, necessarily left to the "fastidiousness or sense of cleanliness of the individual, whether juror or judge who is to pass upon the question?"

In seeking to fathom the meaning of this section the manufacturer could, of course, consult the dictionary, where he would find the word "insanitary" defined "not sanitary, prejudicial to health, likely to cause disease." (Funk & Wagnall's New Standard Dictionary, 1952 Ed.) Such a definition is as vague and uncertain as the statute itself. The difficulty and uncertainty with which the manufacturer is faced under this section is made abundantly clear by the record in this case. The sum of the testimony of Inspector Fred Shallit for the Government is that the plant in question was in an insanitary condition (Tr. 140). On the other hand, witness for the defense Morris J. Hubert of the Quartermaster Corps, Inspection Division, United States Army, which purchased approximately 600,000 pounds of macaroni products from appellants testified (Tr. 265) that from his observation the conditions at the plant were sanitary and that the employees and their uniforms were very clean. He had had occasion to observe the conditions on six or seven times during the months of May and June, 1951 (Tr. 263) and on June 25, 1951 the Army Quartermaster issued a certificate of quality and condition for such items with relation to appellants' plant (Tr. 267) which set forth certain tests that were made and the results, that the products were free from filth.

Thus the words "insanitary conditions" have in

this very case led to that type of uncertainty which requires that a statute be declared void for vagueness. To use the test announced in *Connally v. General Construction Co.*, supra, here is a case, if ever there was one, where men of common intelligence must necessarily guess as to its meaning and differ as to its application. Inspectors from one agency of the Government, the United States Quartermaster Corps of the Army, have differed with the inspectors of the Pure Food and Drug Act. Those differences have arisen even among men who are experts in the field of sanitary inspection and it is fair to assume that ordinary laymen found on jury panels would have occasion to differ even more. Indeed appellants were prepared to show that the Food and Drug inspectors would themselves differ as to whether or not a plant was insanitary, within the meaning of the section here in question. The trial court refused to admit evidence (Tr. 133, 134) which would have tended to show that conditions found in the plant of the Mission Macaroni Company of Seattle were very much the same as those found in appellants' plant and yet the inspector determined that one factory was sanitary and that the other was not. Such uncertainty inheres in the language because it fails to meet the requirement of *U. S. v. L. Cohen Grocery*, supra, in that the section forbids no specific or definite act. When to these words are

added the phrase "whereby it *may* have become contaminated with filth" (emphasis supplied) uncertainty becomes compounded and the subject matter of any investigation then has no bounds. True, the courts have held, see *Berger v. U. S.*, supra and cases cited under point 5, that this language requires more than a mere possibility of contamination but requires a condition which would with reasonable possibility result in contamination. This of course is a clear case of the court straining to avoid unconstitutionality by the process of construction. Appellants respectfully submit that it is not the function of the courts to re-write vague language which standing alone is unconstitutionally indefinite. To use the words of Judge Pope in his concurring opinion in the case of *U. S. v. Cardiff*, supra, though he spoke of another section of the statute it is equally appropriate here,

> "I think that the statute as written is just plain nonsense and because it is not the function of the court to re-write such language the judgment must be reversed."

Under what insanitary conditions may a product become contaminated? Just to state the question demonstrates the fatal uncertainty and indefiniteness of the language. Under the decisions, there is no requirement to show definitely that the product did become contaminated as a result of the "insanitary

conditions." If that be the case, then the question arises, what degree of remoteness with respect to time is within the statutory prohibition? Must products be packed and held at the time when the alleged "insanitary conditions" exist? Or day before or day after, or week before or week after, or a month before or a month after? And again with respect to the physical position of the product with reference to the supposed "insanitary condition." Would products held in the basement, the warehouse or the shipping room possibly become contaminated because of moth larvae on the ceiling of the third floor? We urge that these are not idle suppositions but are questions presented by this case by which a man and his corporation were found beyond a reasonable doubt to be guilty of violating a section of the statute which apparently Congress expected the courts to determine and to define the various conditions which are includable in this phrase. As stated by the Supreme Court of the United States in *U. S. v. C. I. O.*, 335 U.S. 106, 92 L.Ed. 1849, 68 S.Ct. 1349 (1948) at page 142:

> "Blurred signposts to criminality will not suffice to create it."

We urge again that this is not a judicial function but an illegal delegation of legislative power to courts and to juries to determine what acts are criminal.

C. EVIDENCE OFFERED BY THE UNITED STATES TO SHOW THE ADULTERATION OF FOOD IN THAT IT HAD BEEN PREPARED, PACKED AND HELD UNDER INSANITARY CONDITIONS IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

Should the court decide that Section 402 (a) (4) is constitutional, the evidence offered on the trial is nevertheless insufficient to sustain the convictions under this section. As indicated above and we think beyond question, the evidence obtained from inspections on July 18 and 19 is not admissible. The next inspection was made on July 31, 1951. The testimony as to this inspection is found on page 114 of the Transcript and indicates that an unspecified amount of moth activity was present in the plant. There was no testimony whatsoever to connect this condition with products manufactured during the week of July 8 to 14 and shipped on July 16. In other words, the conditions at the plant on July 31, 1951 could have no possible bearing on the question of whether or not the products prepared some three weeks before might have become contaminated thereby, especially in view of the evidence presented by Mr. Joseph Mulvaney, in charge of the plant, beginning on page 202 of the Transcript, which indicates the daily and weekly pro-

cedures for cleaning the plant. Admittedly none of the inspectors were present at the plant during the week of July 8 to 14. The only possible evidence to sustain the convictions under Counts II, III and IV with respect to adulteration through preparation under insanitary conditions rests upon a presumption that the conditions, unspecified as they were, found on July 31, 1951, had continued from the period of July 8 to 14, 1951. Manifestly that sort of presumption on the type of evidence referred to is not sufficient to overcome the presumption of innocence under these charges and constitute proof of guilt beyond a reasonable doubt.

One shipment remains in question though set out in two counts in the indictment, and that is the shipment made on July 26, 1951 to Anchorage, Alaska. Five days after the shipment and seven days after these products were packaged the inspection was made. This presents the question, loaded with uncertainty as it is, do the conditions found on July 31 constitute insanitary conditions whereby the products shipped nearly a week before may have become contaminated. According to the testimony of Mr. Joseph Mulvaney (Tr. 206) who has been in charge of production and been in the plant every day for years, with respect to moth activity, "one day you don't see them and the next day you do." We urge that

any presumption or inference that conditions found on July 31 could affect articles prepared on July 24 is subject to too many variables to prove the guilt of appellants beyond a reasonable doubt. First of all, the evidence is not specific other than to indicate that live and dead moths were found in the factory. This may or may not have given rise to an insanitary condition at the time of the inspection. On this the inspector did not express his opinion. Further, considering the life cycle of the moth and the testimony of Mr. Mulvaney, one day the factory would be free of moths and the next day they would appear. Might the products shipped on July 26th have become contaminated? From the evidence, who can say? Or, what of course is important here, who can say that the evidence is sufficient to support a conviction in view of the Government's burden to prove its case beyond a reasonable doubt. We are aware that the appellate court is not the trier of the fact but urge that in this case the trier of the fact had no evidence sufficient to support his findings of guilt.

D. COUNTS III AND IV OF THE INDICTMENT CHARGE BUT ONE OFFENSE, COUNTS V AND VI CHARGE BUT ONE OFFENSE AND THEREFORE JUDGMENTS AND SENTENCES UNDER COUNT IV AND COUNT VI MUST BE SET ASIDE FOR VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Amendment Five to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law . . ."

The test of double jeopardy is the identity of offenses charged. *U. S. v. Huggins*, 184 Fed. (2d) 866 (1950) and the test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict. *U. S. v. Marzani*, 71 Fed. Supp. 615, District Court of District of Columbia (1947), affirmed 168 Fed. (2d) 133, affirmed 335 U. S. 895, 93 L. Ed. 431. Or if defendant upon the first charge could have been convicted of an offense on the second, then he has been in jeopardy. *State v. Martin*, 154 Ohio 539, 96 N. E.

(2d) 776 (1951). The test as stated in this jurisdiction in the case of *Carney v. U. S.* 163 Fed. (2d) 784, 9th Cir. (1947) citing *Blockburger v. U. S.*, 284 U. S. 299, 76 L.Ed. 306, as to whether two offenses or one is charged, is whether each requires proof of an additional fact which the other does not. Only two cases have been found which decide or consider this problem under the Pure Food and Drug Act. Both of them are District Court cases in other jurisdictions with conflicting results. *U. S. v. Watson-Durand-Kasper Grocery*, 251 Fed. 310, District Court of Kansas (1917) and *U. S. v. Direct Sales Co.*, District Court, Western Division, New York (1918) 252 Fed. 882. We urge that the Watson-Durand-Kasper Grocery Company case has announced the correct rule and should be followed and in some aspects is distinguishable from the case of *U. S. v. Direct Sales Company*, supra. In the Direct Sales Company case the information charged in fourteen counts the misbranding and adulteration of seven different medicines (Acetanalid, calomel, quinine sulphate, salol, sodium salicylate, elixir iron pyrophosphate, strychnine and hydriozyc acid) contained in a single shipment. There was a plea of guilty and a question of the penalty to be imposed. The court held that the article is specified as the unit of offense, as distinguished from the shipment, and here there were seven different articles, each adulterated and each

misbranded, therefore fourteen separate offenses, pointing out that there were deceptions both as to the money value and as to the medicinal value. Note, however or emphasize that each medicine was a different drug intended for a different purpose. The case of *U. S. v. Watson-Durand-Kasper Grocery*, supra, we urge was correctly decided and should be followed. The defendant was charged in seven counts with violation of the Food and Drug Act of 1906 (c. 3915, Sec. 2, 34 Stat. 768) for interstate shipment of adulterated food. Section 2 of that Act made it an offense to transport in interstate commerce any article of food or drugs which was adulterated, stating that:

> "Any person who shall ship * * * any such article so adulterated or misbranded * * * shall be guilty of a misdemeanor and for such offense be fined * * *"

The case was heard on a demurrer and stipulation of the following facts: The defendant shipped two hundred fifty pails of candy, variously labeled, under two railroad freight bills. The samples showed adulteration by analysis. It was held, conceding the adulteration, that only one offense had been committed. The court reasoned that there was but one sale, purchase and shipment and the entire matter grew out of one transaction and the shipment offered

must be taken as a unit although it consisted of many parcels. Referring to the indictment in this case (Tr. 6 to 12) it is evident that the only difference between Count III and Count IV is that Count III charges the adulteration of a food, elbow macaroni, and Count IV charges the adulteration of a food, spaghetti. The only difference between Count V and VI is that Count V charges the adulteration of elbow macaroni and count VI charges the adulteration of spaghetti. On Counts III and IV the consignee was identical, the date of shipment is the same, July 16, 1951, the date of manufacture of the products is the same, the week of July 8 to 14. All the articles appear on one bill of lading and the food in question in each count is one and the same in that it consisted of macaroni products made from the same base, that is, flour paste. The same facts are true of Counts V and VI, that is, the consignee, the date of manufacture, the date of shipment, the bill of lading and the product are identical. The reasoning of the courts in condemnation cases supports appellants' position. In the case of *U. S. v. 935 Cases, More or Less, Containing Six No. 6 Cans of Tomato Puree*, 65 Fed. Supp. 503, District Court, Northern Division of Ohio (1946), a condemnation case under Section 334 of the Act, the court held that the word "article" includes an entire shipment of the same product. The "article" is

the product shipped in the cases or cans and not the individual case or can. The same rule has been adopted in this jurisdiction in the case of *A. O. Andersen & Co. v. U. S.* 284 Fed. 542, 9th Circuit (1922). In other words, were a condemnation proceeding brought as to the shipment charged in Counts III and IV and in Counts V and VI, no distinction could be made between macaroni and spaghetti but the entire shipment containing all of the cases would be subject to condemnation. In other words, the article of food would include the entire shipment and not be restricted to each case involved. The contention of identity of product is further borne out by the testimony of the inspectors themselves. Inspector Shallit (Tr. 76):

> Q. Mr. Shalitt, did you take some samples from some of the shipments involved in this proceeding?
>
> A. Yes, I did.
>
> Q. Which ones were they?
>
> A. On 7-16-51 I visited the West Coast Fast Freight and I obtained *two samples of macaroni products.* (emphasis supplied)

Further applying the tests of double jeopardy as set forth above as between Counts III and IV and Counts V and VI, no additional facts are required to prove Count IV over the facts required to prove Count III and no additional facts are required to

prove Count VI than are required to prove Count V. Or to state it in another way, if appellants had been acquitted on Count III there could have been no conviction on Count IV and if appellants had been acquitted on Count V there could be no conviction on Count VI. The same evidence was used to prove Counts III and IV and the same evidence used to prove Count V and Count VI. To refer again to the language in the *Watson - Durand - Kasper Grocery Co.* case, supra, the shipment offered must be taken as a unit, although it consists of many parcels, or to rely on the language in the condemnation cases, supra, the "article" is the product shipped and not the individual case or can. It follows that appellants were twice placed in jeopardy for the same offense and that convictions and sentences entered on Count IV and on Count VI violate appellants' rights under the due process clause of the Fifth Amendment to the United States Constitution.

E. EVIDENCE OFFERED BY THE UNITED STATES FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE FOOD COMPLAINED OF WAS ADULTERATED BECAUSE IT CONSISTED IN PART OF A FILTHY SUBSTANCE

(1) The insect fragment count present was infinitesimal by weight, volume, or any other standard of measurement.

It is appropriate to state at the outset of this discussion the important principle that must not be lost sight of and that is that a proceeding charging interstate shipment of adulterated food is a criminal proceeding in which the burden of proving the allegations beyond a reasonable doubt rests upon the Government and that the defendants are entitled to the recognized presumption of innocence. *U. S. v. Commercial Creamery Co.*, 43 Fed. Supp. 714 (D.C. E.D. Wash.) (1942). The case of *Alberty v. U. S.* 159 Fed. (2d) 278, 9th Cir. (1947) is authority for the proposition that though civil actions construe the Act liberally no such construction should be used against an accused in a criminal case, citing with approval the language of *M. Kraus and Brothers, Inc. v. U. S.* 327 U. S. 614, 621, 90 L. Ed. 894, which strictly

construed the criminal sanctions of the Emergency Price Control Act. Even in the condemnation cases, as for example, *338 Cartons, etc. v. U. S.* 165 Fed. (2d) 728, 4th Cir. (1947), the court held that the jury was properly instructed that in order to make a finding that the butter in question consisted in part of a filthy substance it must be satisfied that the filth was present in a substantial degree.

Though each case must necessarily turn upon its own facts, an examination of the decided cases will aid in resolving the question, first of all, what is filth? And secondly, whether or not the evidence in this case is sufficient to support the convictions. *Triangle Candy Co., et al v. U. S.* 144 Fed. (2d) 195, 9th Cir. (1944) held that where the plant contained rats and cockroaches and samples indicated the product contained an excess of rodent hairs, insect larvae, fragments and pellets of rodent excreta that the product contained a filthy substance. In the case of *U. S. v. 391 Second Hand Bags of Coffee,* D.C. E.D. N.Y. (1950), reported in 2 Food, Drug, Cosmetic Law Reporters, 7864, the product contained dirty and scorched paper, nails, charcoal, wood splinters, glass and metal fragments, small manure fragments, rodent pellets and had been submerged in polluted water. Held adulterated. *U. S. v. 284 Barrels of Dried Eggs,* D.C. W.D.

Tenn. (1943) 52 Fed. Supp. 661, held when dried eggs were offensive to the sense of smell and eggs contained from 122 million bacteria per gram to a maximum of over 4 billion bacteria per gram, the product was adulterated and subject to condemnation.

U. S. v. 44 Cases, etc. Viviano Spaghetti with Cheese, 101 Fed. Supp. 658, D.C. E.D. Illinois (1951) the product condemned contained fly eggs and maggots. *U. S. v. Lazere*, D.C. N.D. Ia. (1944) 56 Fed. Supp. 730, the defendant was enjoined under temporary injunction from shipping bakery products when it appeared that the flour in the storeroom had been gnawed by rats and contaminated by urine and excreta from rodents, nests and the young of mice, cockroaches crawling in the food and a sewage problem in the basement and ten to twenty-five flies on each tray of rolls.

In the case of *U. S. v. Roma Macaroni Factory*, 75 Fed. Supp. 663, D.C. N.D. Cal., the product contained vermin excrement, rodent hairs and other hair.

U. S. v. 133 Cases of Tomato Paste, 22 Fed. Supp. 515, D.C. E.D. Penn. (1938) the evidence showed that the paste had been manufactured from tomatoes infested with corn ear worms and the paste showed eighty-five worm fragments per 300 cubic centimeters. The product was condemned.

In the foregoing cases there is little doubt and no room for argument that the food involved contained a filthy substance. However, the facts in this case and the evidence of adulteration do not fall within that group of cases. The decisions are unanimous for at least one proposition and that is that the word "filthy" as used in the Act should be construed to have its usual and ordinary meaning and should not be confined to any scientific or medical definition. *U. S. v. Swift & Co., et al,* D.C. M.D. Ga. (1943) 53 Fed. Supp. 1018; *U. S. v. Lazere,* supra and *A. O. Andersen & Co. v. U. S.,* supra.

In the *Andersen Case* the court stated in defining the word "decomposed":

> "Decomposed means more than the beginning of decomposition. It means a state of decomposition and the statute must be given a reasonable construction to carry out and effect the legislative policy or intent."

By analogy, which seems proper since the word "decomposed" appears in this same section of the Act, the word "filthy" must mean more than a beginning, it must mean a state of filth, if the statute is to be given a reasonable construction. The testimony of the Government to prove that the products were adulterated by reason of the fact that they consisted in part of a filthy substance, begins on page 153 of the Transcript and was presented by Robert Elliott, Chemist

for the United States Food and Drug Administration. His unreasonable, unscientific and unrealistic approach toward the inspection is revealed by his testimony on page 176 in which he gave his opinion that a sample containing but one moth fragment would be unfit for food, basing his opinion on his conclusion that the same would be a filthy product. In contrast, attention is invited to the testimony of Morris J. Hubert, previously mentioned, of the Army Quartermaster Corps, which issued a certificate of quality and condition for subsistence, and the testimony of Swain Oddson, supervisor of Quartermaster Inspectors for the Army (Tr. 270), who stated that in contracts performed by appellants totaling 600,000 pounds during the month of May and June, 1951 there had been no rejections whatever, and the testimony of William J. Carr, (Tr. 272) Chief Chemist of the Seattle Branch of the Sixth Area Army Medical Laboratory, stating that by Army standards the presence of insect fragments ten to a portion would not constitute a filthy substance.

Equally impressive is the testimony of Dr. Paul V. Gustafson (Tr. 277) professor at the University of Washington Medical School teaching in the micro-Biology Department, who testified as follows:

> Q. And Doctor, assuming that you have a half a pound of spaghetti and that in that half

pound of spaghetti there was as much as twenty-two insect fragments, moth scales and a capsule identified in size under the miscroscope roughly represents four and four-tenths parts per million by volume, state whether or not in your opinion that would be filthy?

A. (Over objection) I can't see how that would be called filthy.

The testimony of John Spinelli, employed by the Food, Chemical and Research Laboratory of Seattle, which is equally realistic, scientific and impressive in reaching a determination as to whether or not the appellants' product consisted in whole or in part of filthy substance, testifying on page 246:

Q. So that the total volume of the insect fragments that you discovered in relationship to the total volume of the sample you used was roughly, would you say, one or two parts per million?

A. Something on that order. If you were calculating that out it would run in parts per million.

Q. And the same would be true, would it, so far as the weight is concerned?

A. That is right. You have to make a few assumptions. You would have to assume the weight of the moth at the same density as spaghetti but it is so inconsequential in making that kind of a determination that you could safely assume that it would be in parts per million.

Q. Could you give us some example now what you mean, parts per million, in ordinary daily

examples?

A. Oh, probably the foreign particles floating around in this room run over four or five parts per million. A glass of water perhaps has several parts per million of suspended solids.

Even accepting the findings of the Government chemist to be correct, when viewed in the light of the rule that the words "filthy substance" must be taken to have their usual and ordinary meaning, appellants' product is not filthy. It cannot be the meaning or intention of Congress that a product is filthy which contains less contamination than the air we breathe, less contamination than a glass of water, that contains foreign particles that can only be discovered under a high powered miscroscope, that is not offensive to the senses of sight, touch, taste or smell and in no way injurious to health.

(2) THE TRIAL JUDGE ERRED IN REFUSING TO CONSIDER ARGUMENTS ON THE QUESTION: "WHAT IS FILTH?"

Coloring and hampering appellants' entire presentation of their defense was the court's ruling to be found on page 182 of the Transcript, in which he said:

> "Now, filth is filth. You don't have to go into refinements about analyzing what constitutes filth to me. You will abandon that portion of your

argument. It wouldn't have existed there at all if proper precautions had been taken."

The very essence of this case is the question "What is filth?" Or do these products consist in whole or in part of a filthy substance? No fair trial could be had without the fullest presentation of evidence and argument on this one point of law before a judge who had obviously pre-judged this question before the appellants had an opportunity to present their defense. It is urged that this is not harmless error but is crucial and goes to the very heart of the case. How could there be proof of guilt beyond a reasonable doubt when the most important part of that proof was not even considered by the trial court.

(3) There was no showing in evidence that the product complained of was in any sense injurious to health or safety or unfit for food.

Section 402 (a) (3) of the Federal Food and Drug Act of 1938 provides:

> "A food shall be deemed to be adulterated if it consists in whole or in part of any filthy, putrid or decomposed substance or if it is otherwise unfit for food."

The Courts of Appeal for the 10th Circuit and the 8th Circuit have held that the words "or if it is otherwise unfit for food," do not condition, qualify or add any requirements of proof to the preceding words.

These cases are *U. S. v. 1851 Cartons Labeled in part "H & G Famous Booth Seafoods," et al*, 146 Fed. (2d) 760, 10th Circuit, (1945) and *Salamonie Packing Co. v. U. S.* 165 Fed. (2d) 205, 8th Circuit (1948) (Cert. den. 333 U.S. 863, 92 L.Ed. 1142). The latter opinion merely follows that of the 10th Circuit without discussion of the question.

Appellants urge that those cases are erroneously decided and should not be followed in this jurisdiction. Section 402 (a) of the Act also contained in Section 342 (a) of Title 21, USCA, under which these actions were brought, shows what Congress was trying to accomplish. This section has six sub-divisions:

"A food shall be deemed to be adulterated;

(1) if it bears or contains any *poisonous* or deleterious substance which may render it *injurious to health;* but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it *injurious to health;* or

(2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 406; or

(3) if it consists in whole or in part of any filthy, putrid or decomposed substance or if it is *otherwise unfit for food;* or

(4) if it has been prepared, packed or held under insanitary conditions whereby it may have

become contaminated with filth or whereby it may have been rendered *injurious to health;* or

(5) if it is in whole or in part the product of a *diseased animal* or of an animal which has died otherwise than by a slaughter; or

(6) if its container is composed in whole or in part of any *poisonous* or deleterious substance which may render the contents *injurious to health.*" (Emphasis supplied)

Reading the section as a whole it is apparent that Congress had in mind prohibiting the interstate commerce of food products which were dangerous to health and unfit for food. Before the amendment of June 25, 1938, a comparable section of the Act, 21 U.S.C.A. 8, read that a food shall be deemed to be adulterated:

"6. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not."

The amendment inserted the word "any" before the word "filthy" and the word "otherwise" before the word "unfit" so that it read:

"A food shall be deemed to be adulterated . . . (3) if it consists in whole or in part of *any* filthy, putrid, or decomposed substance, or if is is *otherwise* unfit for food; . . ." (Emphasis supplied)

As a matter of first impression it seems conclu-

sive that the amended section indicates that Congress intended that the filthy, putrid or decomposed substance must make the product unfit for food. There would seem to be no reason for the word "otherwise" except to refer to the first part of the sentence. The cases decided prior to the amendment of course held this section as prohibiting the interstate shipment of food which consisted in whole or in part of any filthy, putrid or decomposed substance, irrespective of whether it was injurious to health. *A. O. Andersen & Co. v. U. S.*, supra. But there seems to be no logical reason for decisions since that time to ignore the words that Congress added to this section by the amendment. The case relied upon in the 10th Circuit cited above, *U. S. v. 1851 Cartons, etc.*, and the 8th Circuit case, *Salamonie Packing Co. v. U. S.*, supra, is a District Court case, *U. S. v. 184 Barrels Dried Whole Eggs*, 53 Fed. Supp. 652, which is only authority for the proposition that the amended language does not require a showing that the food in question is injurious to health and this proposition is based upon the case decided under the 1906 Act. It can be assumed that Congress was aware of these interpretations and passed the amendment with these decisions in mind so that Section 402 (a) 3 might be brought into line and made consistent with other sections of the Act contained in Section 402, when read as a whole, in

view of the apparent purpose to prevent the shipment of food products which were dangerous to health and unfit for food. The phrase "otherwise unfit for food" must mean something, unless it is to be ignored by the court. As stated by the United States Supreme Court in the case of *62 Cases of Jam v. U. S.*, 340 U. S. 593, 59 L.Ed. 566, 71 S.Ct. 515 (1951) at page 596, the court stated:

> "Our problem is to construe what Congress has written. After all, Congress expresses its purpose in words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor distort."

And in the same case we find this language:

> "In construing the Federal Food, Drug and Cosmetic Act to effectuate the Congressional purpose of protecting the public, the Supreme Court must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Or as stated by the court in the case of *C. C. Company v. U. S.*, 147 Fed. (2d) 820, C.C.A. Georgia (1945):

> "The Federal Food, Drug and Cosmetic Act was enacted in the interest of the public welfare, to protect public health and courts must give it effect according to its terms."

In the 10th Circuit case, *U. S. v. 1851 Cartons*, etc., supra, the court stated that;

> "There may be drawn a fair inference from the language that Congress considered that proof of the condition described made the particular article or product unfit for food."

This statement if made explicit and expressed in the form of a hypothetical syllogism would read as follows:

> "If a product consists in whole or in part of a filthy, putrid or decomposed substance, then it is unfit for food."

If this statement is valid, that is, if the consequent follows from the antecedent, then the logical conclusion which necessarily follows is:

> If the product is not unfit for food, then it does not consist in whole or in part of any filthy, putrid or decomposed substance.

This exactly states the position of the appellants and, we submit, is what the language of the Amendment expresses as the intention of Congress. It was not the intention of Congress so far as can be found in the language of the Act, to protect the aesthetic senses of the public. As expressed in the case of *McNeill & Higgins Co. v. Martin*, 107 So. 299, Supreme Court of Louisiana (1926):

> "The object of that act (Pure Food and Drug Law) is to keep unwholesome, adulterated and misbranded articles out of interstate commerce. It is a far cry from what may not be thought fit

> for human consumption because it may be unpalatable to that which is unfit for consumption because it is unwholesome. Bird nests, shark fins, blubber, snails, etc. may be highly repulsive as food to some but many regard them as delicacies. Pure Food Laws are not intended to regulate tastes or appetites but to secure against unwholesome food."

Unless this construction is adopted the results of the Act are absurd in that in one section it allows products to contain the most dangerous poisons so long as not injurious to health but requires the criminal conviction of one who has shipped products containing two or three parts per million of adulteration, which is less than that found in the air we breathe or the water we drink and according to all the evidence in the case, is in no sense unfit for food or harmful to the consumer in any way. As mentioned above, the construction contended for by the appellants gives affect to the intent of Congress as declared by the Supreme Court of the United States and gives meaning to the words that Congress used to express its intention.

F. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL.

Because of the admission of evidence which is obtained illegally and by the court's refusal to admit

testimony of the appellants bearing on the question "What is Filth?" and whether or not the product was injurious to health and in failing to consider argument on the question "What is filth" and what is the meaning of the expression "insanitary conditions" the trial court erred in denying appellants' motion for new trial.

G. THE EVIDENCE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE APPELLANT PASKEY DEDOMENICO AS AN INDIVIDUAL COMMITTED ANY ACT OR HAD ANY INTENT TO COMMIT ANY ACTS WHICH CONSTITUTED OFFENSES CHARGED IN THE INDICTMENT.

(1) APPELLANT WAS NOT PHYSICALLY PRESENT AT THE TIME WHEN THE FOOD WAS ALLEGEDLY INTRODUCED INTO INTERSTATE COMMERCE

(2) APPELLANT WAS NOT PHYSICALLY PRESENT AT THE FACTORY WHEN THE EVIDENCE WAS OBTAINED FOR THE PURPOSE OF SHOWING INSANITARY CONDITIONS

(3) APPELLANT ACCORDING TO THE EVIDENCE DID NOT AID, ABET, ENCOURAGE, COUNSEL, PLAN, PROCURE, PARTICIPATE OR IN ANY WAY ACT AS AN ACCESSORY TO THE CRIME

(4) APPELLANT DID EVERYTHING WITHIN HIS POWER TO INSURE THAT THE FACTORY WOULD BE IN A SANITARY CONDITION BOTH BEFORE AND DURING HIS ABSENCE AND ISSUED ORDERS AND INSTRUCTIONS WHICH IF CARRIED OUT WOULD HAVE PREVENTED ANY INSANITARY CONDITION

The above four items all pertain to the same principle of law and the same evidence. Consequently they will be argued as one item.

Turning now with more particularity to the appellant Paskey Dedomenico as an individual against whom the indictment in the above entitled case was brought and for the purpose of brevity we incorporate herein the arguments heretofore made relative to the points raised by the appellant corporation, and further rely upon the additional point that a careful

reading of the record and consideration of exhibits will show that the appellant Paskey Dedomenico, if he, as an individual, is to be found guilty upon the facts and evidence in this case it must be solely upon the basis that he was a corporate officer and therefore had a vicarious criminal liability for any offenses committed by the corporation through its agents and employees.

A careful search of the record utterly fails to reveal that he committed any of the acts or participated in or aided and abetted in the commission of any of the acts which are alleged to have constituted the offenses charged in the indictment.

The evidence clearly shows that appellant was not physically present at the time the food was allegedly introduced into interstate commerce. He was not only not at the plant but was absent from the state. (Tr. 79, 280 and 284.)

A careful reading and consideration of the evidence clearly shows that appellant Paskey Dedomenico did everything within his power to see that no such offenses as charged in the indictment were committed. That he conducted his activities entirely within the scope and provisions of the Act at all times when he was present and directly in charge and responsible for the manufacturing processes used and the introduc-

tion of the product into interstate commerce. (Tr. 288)

It is an elementary principle of criminal law and indeed the very foundation of our criminal statutes that no individual can be held criminally liable under statutory prohibition unless the statute specifically and with reasonable certainty specified that he is one of those individuals to whom the prohibition applied. See Baty Vicarious Liability (1916) p. 218-219; *State v. Carmean*, 126 R. 291, 102 N. W. 97 (1905); and *Cotton Mill Co. v. People*, 32 Col. 263, 75 Pac. 924 (1904); *People v. England*, 27 Hun. 139 (N. Y. 1882); *Rex v. Hendrie*, 11 Ont. L. Rep. 202 (1905); *Rex v. Hays*, 13 Ont. L. Rep. 201 (1907); *U. S. v. Winslow*, 195 Fed. 578, aff'd in 227 U. S. 202, 57 L.Ed. 481, 33 S. C. 253 (1913).

This principle has been further enunciated and followed by the Federal Court in several jurisdictions. See *Union Pacific Coal Co. v. U. S.* (8th Cir. 1907) 173 Fed. 737, wherein the court states the rule:

> "A corporation is a person, within the meaning of this act. It is another and different person from any of its stockholders, whether they are corporations or individuals and no corporation can, by violating the law, make any one of its stockholders who does not himself participate in that violation, criminally liable therefor."

Also see *Shreiber v. Sharpless*, 6 Fed. 175;

Taylor v. Gilman, 64 Fed. 632, *Reynolds v. Hearst* (1899 Cal.) 95 Fed. 652, which cites with approval and follows the case of *Railway Co. v. Prentice*, 147 U. S. 101, 37 L. Ed 97, 13 Sup. Ct. 261. Counsel for the plaintiff cited and relied upon the case of *U. S. v. Dotterweich*, 320 U. S. 77, 64 S. Ct. 134, 88 L. Ed. 48 (1943) as holding to the contrary. However, a careful reading of this decision, which incidentally was a five to four decision, shows that the corporation and Dotterweich its president and general manager, were both charged with violations of the Federal Food, Drug and Cosmetic Act. A reading of the case clearly shows that in that case Dotterweich the individual defendant, aided, abetted, advised, encouraged, authorized and participated in the very acts of which he and the corporation were accused. As a matter of fact the jury found that the corporation itself had NOT committed the acts but that the corporate officer himself had. The decision of the court, and the case was decided entirely and solely upon the question of the guaranty provisions of Section 303 (c) of the Federal Food, Drug and Cosmetic Act.

Justice Murphy in the dissenting opinion observes:

> "It may be proper to charge him with responsibility to the corporation and the stockholders for

> negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability upon an act in which the accused did not participate nor of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizens the legislative mandate must be clear and unambiguous."

It is respectfully submitted that Congress has not acted and stated clearly and unambiguously that corporate officers shall be liable in their personal capacity and individually for the criminal acts of the corporation. The record of the proceedings in Congress and the legislative history of the Act, indicates that it was not the intention of Congress so to provide.

Section 2 of the 1906 Act, which was the predecessor to the 1938 Act under which the defendant Dedomenico was prosecuted, contained the provision which was introduced to the effect that any violation of the Act by a corporation should be deemed to be the act of the officer responsible therefor individually and such officer might be punished as though it were his own act. Senator Heyburn, who was a sponsor of the Act, stated that this provision was necessary and was intended to obviate the possibility of escape by officers of a corporation under their personal plea that they did not know what was being done or that it was the responsibility of the corporation. (40 Con-

gressional Record, p. 94). This is the identical plea of the appellant and defendant Paskey Dedomenico in this case and had this provision remained in the Act the plea would not be well taken.

In 1938 the framers of the Act in question herein were aware that the 1906 Act was deficient in that it failed to place responsibility properly upon corporate officers. (Senate Report 493, 73rd Congress, 2nd Session, p. 21). This report states as follows:

> "It is not, however, the purpose of this paragraph to subject to liability those directors, officers, and employees who merely authorize their subordinates to perform lawful duties and such subordinates on their own initiation perform those duties in a manner which violates the provisions of the law. However, if a director or officer personally orders his subordinates to do an act in violation of the law, there is no reason why he should be shielded from personal responsibility merely because the act was done by another or on behalf of the corporation."

In order to provide the necessary law to prevent the use of a corporate firm and fiction as a shield, the framers of the 1938 Act sought to insert in the Act the following provisions:

> "Whenever a corporation or association violates any provision of this Act, such violation shall also be deemed to be a violation of the individual, director or officer, who authorized, ordered, or directed any of the acts constituting in whole or in part such violation."

Had this been enacted and included in the 1938 Act then there could be no question, assuming that the above was constitutional, that the appellant Paskey Dedomenico would properly have been held and convicted for the offenses as charged under the Act. However, Congress deleted the above provision from the final version of the 1938 Act, thus clearly indicating that Congress did not intend to make an officer or director of a corporation responsible for the violation of the acts of another or for the violation of the corporation. See Senate 1944, 73rd Congress, First Session, S. 18 (b).

Congress can and has imposed liability on corporate officers and individuals in other situations. See Anti-Trust Laws, 15 U.S.C.A. Sec. 24; Bankruptcy Laws, 11 U.S.C.A.; and cases involving fraud under mortgage loans, 46 U.S.C.A.; and for liability of employees working under certain conditions, 45 U.S.C.A.

A careful reading of cases in which criminal liability has been imposed upon a corporate officer reveals that they have arisen in two cases: One where the corporate officer actively participates, aids, abets, advises, encourages the criminal offense and secondly where the corporation is organized solely as a front for the individual or for the purpose of committing

criminal acts or for the conducting of unlawful business or a nuisance such as the operation of a house of prostitution and the most common case reports involving the establishment of a corporation for the purpose of conducting bootlegging and moonshining activities. That is not the situation here, nor is it contended by the plaintiff that such was the corporate structure herein.

It is only by a very strained construction of the Act, by the court, which Congress never intended that the president or corporate officer of a corporation who personally had never actually participated in the criminal acts, who had never abetted, advised, encouraged, authorized or participated therein, could be held.

The fundamental rule of construction of acts of a penal nature is that they shall be very strictly construed. This principle was early enunciated in our jurisprudence by Chief Justice John Marshall in the case of *U. S. v. Wiltberger*, 5 Wheat. 76, 5 Law Ed. 337, 18 U. S. 76. This great jurist observes:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, nothwithstand-

> ing, this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. * * * That this is not a new independent rule which subverts the old. * * * The intention of the legislature is to be collected from the words they imply. * * * To determine that a case is within the intention of a statute its language must authorize us to say so."

This principle has become well established and has been cited with approval and followed in *McCollum v. Hamilton National Bank of Chatanooga*, 303 U.S. 248, 82 L.Ed. 822, 58 S.Ct. 570; *Osaka Shosen Kaisha Line v. U. S.* 300 U. S. 101, 81 L.Ed. 534, 57 S.Ct. 357; *U. S. v. Resnick*, 299 U. S. 209, 81 L.Ed. 129, 57 S.Ct. 127; *Asulo v. U. S.* 272 U. S. 628, 71 L.Ed. 445, 47 S.Ct. 202; *Boston Sand Co. v. U. S.* 278 U. S. 53, 73 L.Ed. 179, 49 S.Ct. 56; *U. S. v. Harris*, 177 U. S. 305, 44 L.Ed. 780, 20 S.Ct. 611; *Sarlls v. U. S.* 152 U. S. 570, 38 L.Ed. 556, 14 S.Ct. 720.

The rule is stated in 19 C.J.S. 931, page 363:

> "Officers, directors, or agents of a corporation may be criminally liable individually for individual acts done by them in behalf of the corporation. They cannot, in absence of a statute, be held as liable for acts in which they have not either actually participated or which they have not directed or permitted."

The earliest case is that th *Rex v. Hays*, supra, annotated in 8 Ann. Cas. 380-383. In that case the

charge was that the second vice-president and general manager of the railroad committed the offense while the findings were that the corporation had actually committed the offenses. The court held that in the absence of some clear statutory enactment that the defendant could not be punished for the default of his company. Justice Meredith observes the rule to be:

> "This case presents upon its face these extraordinary and illogical features: The company, and the company only, have been found guilty; and yet the individual, and the individual only, has been convicted. There is no power to make a criminal of one for the offenses of another * * * There is no excuse for his conviction for an offense found to have been committed by the company only * * * In order to make out a case against the defendant, it was necessary for the prosecution to show that he aided, abetted the commission of the offense, or counseled or procured it."

The annotation in 8 Ann. Cas. at 380 observes the rule as follows:

> "The question of the criminal liability of the officers of a corporation for its acts of nonfeasance or misfeasance seems seldom to have arisen. The weight of modern authority as nearly as it can be determined from the few reported cases, is apparently as laid down in the reported case, viz., That an officer of the corporation is not liable for an offense committed by the corporation, except where he has in some way participated in the illegal act, as an aider, abettor, or accessory."

The same rule has long been followed in the State

courts in the State of Washington and in the courts from other jurisdictions: *State v. Thomas*, 123 Wash. 299, 212 Pac. 253; *State v. Comer*, 176 Wash. 257, 28 Pac. (2d) 1027; (appeal dismissed in *Comer v. State of Washington*, 78 L.Ed. 1470); *State v. German*, 162 Ore. 166, 90 Pac. (2d) 185; *State v. Ross*, 104 Pac. 496; *State v. Parker*, 151 Atlantic 325; *Ledbetter v. State*, 104 So. 777; *People ex rel Billeci v. Klinger*, 300 N.Y.S. 408; *People v. Brainard*, 183 N.Y.S. 452; *State v. Lux*, 50 N.W. (2d) 290 (1952); *People v. International Steel Corporation* (Cal. 1951) 236 Pac. (2d) 587.

In a very recent case in 1944 of *U. S. v. Harvey* found in 54 Fed. Supp. 910, District Court of Oregon, the court held that the executive officers of the corporation which was the owner of a vessel could not be charged as principals for the acts and omissions of the captain, pilot, or other persons in charge of operating the vessel, and that it is necessary for the indictment to charge the corporation guilty of the offenses and that the officers aided, abetted or acted knowingly in the commission of the offenses.

A careful reading and analysis of every case reported and digested, both in the State courts and Federal courts, will disclose that there has never been a single instance in which the court has imposed crimi-

nal liability upon the corporate officers of a corporation for the criminal acts of a corporation. There is no recognition of a vicarious criminal liability under our system of jurisprudence. In every case in which the corporate officer was convicted the evidence clearly showed that he had actually performed the criminal acts himself or that the corporate officer participated in the performance of the criminal acts, or aided, abetted or advised in the performance thereof. The only exception to this is the situation wherein a statute specifically stated that corporate officers were liable for the offenses committed by the corporation. We find no such position in this legislative enactment by Congress and indeed as shown the history of the act herein involved Congress did not intend such to be the effect of their legislative enactment because they specifically deleted that portion from the final act as passed by them in 1938.

It is respectfully submitted that as to the appellant, the individual Paskey Dedomenico, the conviction branding him as a criminal should be set aside and reversed and the information dismissed. He has not committed any offense under the Act, and there is no provision under the Act making him liable solely by reason of the fact that he was an officer of the corporation. This respected business man, with his family, a leader in the community in which he lives and

onducts his business, should not be held as a criminal ecause of the acts of another.

The evidence is clear and overwhelming that he at ll times sought to comply with the provisions of the ct, and did so comply. The plant was cleaned when e left for California (Tr. 288) and was regularly leaned, disinfected and inspected by him or under his nstructions at all times (Tr. 285-289 and 297-300) hen he was present. He did not in any way aid, bet, advise, encourage, plan, procure or participate n any of the offenses of which he was charged.

V. CONCLUSION

In the light of the foregoing, appellants respectully submit that the Pure Food and Drug inspectors id not first make a request and obtain permission rom the owner, operator and custodian of the plant; nat the evidence which they obtained as a result of neir unauthorized entry and inspection was not adnissible; that Section 402 (4), Federal Food, Drug nd Cosmetic Act is unconstitutional because it was ague, ambiguous and indefinite and therefore conrary to the Sixth Amendment to the United States onstitution; that evidence which was submitted and ffered by the United States to show adulteration was nsufficient to sustain the convictions; that Counts III nd IV of the Indictment charged but one offense, and

Counts V and VI of the Indictment charged but one offense; that the conviction of the appellants on these counts constitutes double jeopardy; that the shipment of the products complained of in the indictment did not consist in whole or in part of a filthy substance within the meaning of Section 402 (a) 3 of the Federal Food, Drug and Cosmetic Act; that there was no evidence of filth and contamination within the meaning of the Act sufficient to sustain the convictions of the corporation and of the individual, Paskey Dedomenico; that the defendant appellant Paskey Dedomenico as an individual officer and president of the corporation did not aid or abet, participate or advise in any of the acts which may have constituted offenses under the Act; the evidence failed to show beyond a reasonable doubt that the individual appellant committed any act or had any intent to commit any act which may have constituted offenses as charged in the indictment; that the evidence is not sufficient to convict the appellant Paskey Dedomenico as an individual; that the president of a corporation such as the individual appellant Paskey Dedomenico cannot be held criminally liable in a prosecution for the criminal acts of another.

Even if the corporation and the individual appellant are found guilty as charged the fine is so excessive

as to indicate abuse of discretion on the part of the trial judge.

Appellants therefore pray that the judgment, conviction and sentences heretofore imposed by the trial court be set aside and that the indictment be dismissed as to each of the appellants, or in the alternative that appellants be granted a new trial by reason of the errors as set forth herein.

Respectfully submitted,

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